

DOL Announces that Large Employers Must Comply with OSHA Vaccine ETS by January 10, 2022

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Late on Friday, December 17, 2021, a three-judge panel of the Sixth Circuit Court of Appeals ruled 2-1 to lift the stay imposed by the Fifth Circuit Court of Appeals on November 6, 2021 on the OSHA COVID-19 Vaccination and Testing **Emergency Temporary Standard** (ETS). On December 18, 2021, the U.S. Department of Labor issued a **press release** which states the following:

“To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.”

Based on this recent statement by the DOL and as previously discussed in the **Fast Laner**, employers with 100 or more employees will need to comply with the following requirements by **January 10, 2022**:

1. Draft, implement and enforce a written mandatory vaccination policy, which, at the employer’s option, may include weekly testing if an employee is not fully vaccinated or has a religious or disability related exemption from the vaccination requirement.

Practice Areas

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2. Determine the vaccination status of its employees and maintain a roster of the same.
3. Provide Paid Time Off (PTO) for time taken to receive the vaccination (up to four hours) and recovery from any reaction to the vaccine (up to two days).
4. Remove COVID-19 positive employees from the work environment until they meet certain “return to work” criteria.
5. Require face coverings be worn by all employees who are not fully vaccinated when indoors or in isolated areas with other people.
6. Provide notice to employees of the ETS, the benefits of being vaccinated, the anti-retaliation and non-discrimination provisions and notice that providing false vaccination cards or testing results could result in criminal penalties.

By **February 9, 2022**, employers subject to the ETS must cause employees who are not fully vaccinated to undergo weekly testing or test within seven days before returning to work (if away from the workplace for a week or longer). Over-the-counter antigen testing is acceptable, but it must be observed by the employer or an authorized telehealth proctor. Employers may require employees to pay for the testing pursuant to the ETS. However, accommodation requirements, state law, or collective bargaining issues may require the employer to pay for the tests and the time spent in testing and travel to and from the testing site.

Challengers of the ETS have already filed a petition with the U.S. Supreme Court requesting its review of the Sixth’s Circuit’s ruling lifting the stay. If the Supreme Court accepts the petition to review, there is no guarantee as to how the Supreme Court will rule. Even though there may be a chance that the Supreme Court hears the petition and possibly reimposes the stay, there is no telling when the Supreme Court will issue a decision on the matter. Employers that delay implementation of the ETS by taking a “wait and see” approach risk being found by OSHA not to have taken “reasonable, good faith efforts to come into compliance” with the ETS.

Public sector employers should continue to monitor local OSHA developments because certain States, including Illinois, are required to adopt the ETS or an equivalent rule. In Illinois, the Illinois Department of Labor (IDOL) typically adopts federal OSHA rules and standards thirty days after they are published. The IDOL put its decision-making process on hold when the stay was entered. Now that the stay has been lifted, IDOL is expected to take action to adopt the rule or an equivalent standard relatively soon for Illinois public employers.

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Laner Muchin is dedicated to providing practical, legal advice for your workplace during this ever-changing regulatory landscape. Employers are advised to review the resources on OSHA's **website** related to the ETS which include useful FAQs, fact sheets and model policies.

Given the ever-changing nature of the status of OSHA's ETS, employers should seek counsel regarding the options applicable to their specific business needs and workforce. Please contact your Laner Muchin servicing attorney for questions on how your organization should navigate this complicated matter.